United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 16-0927**
	)	**Issued: February 13, 2017**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, FORT SAM HOUSTON, TX, Employer	)	

Appearances:
William Hackney, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2016 appellant, through counsel, filed a timely appeal from a February 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on June 30, 2014.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 3, 2014 appellant, then a 40-year-old security specialist, filed a traumatic injury claim (Form CA-1) alleging that at 1:00 p.m. on Monday, June 30, 2014 he sustained injuries to his neck, shoulder, and right leg due to a fall on the stairway going from the second to the first floor of his home in San Antonio, TX.[3] He attached a statement in which he explained that on June 30, 2014 he was relocating his telework items from his home to the Commissary at Fort Sam Houston, TX, at the direction of his supervisor. Appellant indicated that, as he was carrying a box of reference materials and supplies down the stairs in his home, his right leg gave out and he tumbled down the last six steps and he impacted the wall at the bottom of the stairs head. He submitted July 7 and 17, 2014 reports in which an attending physician listed a date of injury as June 30, 2014 and a diagnosis of "right leg/head." The physician indicated that appellant was totally disabled.

In the supervisor portion of the Form CA-1, appellant's immediate supervisor indicated that appellant's duty station was at Fort Sam Houston and that his regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. In a July 9, 2014 statement attached to the Form CA-1, the supervisor contended that appellant had not sustained an injury in the performance of duty on June 30, 2014 because his alleged injury occurred at home despite the fact that he had directed appellant on three occasions prior to June 30, 2014 to report to the Fort Sam Houston Commissary at 7:00 a.m. on June 30, 2014.[4] He noted that he knew nothing about appellant making trips back and forth from his home to the Fort Sam Houston Commissary to haul office supplies. The supervisor indicated that appellant never asked him permission to carry out this task and he did not approve it. He noted that appellant's duty station on June 30, 2014 was the Fort Sam Houston Commissary. The supervisor indicated that on June 26, 2014 he advised appellant that he was taking him off his teleworking schedule of five days per week and that he had to work at the Fort Sam Houston Commissary.[5]

In a July 22, 2014 e-mail to an injury compensation specialist for the employing establishment, appellant's immediate supervisor indicated that his comment to appellant to "bring [appellant's] work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014 was not meant to imply that he had approved trips to and from his residence.

In a July 24, 2014 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted an August 21, 2014 report in which an attending physician again listed a date of injury as June 30, 2014 and a diagnosis of "right leg/head" and indicated that he was totally disabled.

[3] Appellant stopped work on June 30, 2014.

[4] The record contains a June 13, 2014 e-mail in which appellant's supervisor directed him to report to the Fort Sam Houston Commissary for work on June 30, 2014.

[5] The record contains a June 27, 2014 statement in which a store director for the employing establishment indicated that he was present when appellant's immediate supervisor advised appellant that he was taking him off his teleworking schedule of five days per week.

By decision dated August 26, 2014, OWCP denied appellant's claim for a June 30, 2014 work injury. It found that he had established a work incident on June 30, 2014, but that he had not submitted medical evidence establishing that a specific condition was sustained due to the work incident.

On October 28, 2014 appellant requested reconsideration of OWCP's August 26, 2014 decision. He submitted a statement in which he indicated that he felt that the multiple trips he took to and from his home were necessary to move his many files, reference materials, office supplies, and other work items. Appellant also submitted a letter to his congressman in which he asserted he was following his supervisor's order to move his work belongings from his home to the Fort Sam Houston Commissary. He also submitted additional medical reports from June and July 2014.

In a November 18, 2014 letter, an injury compensation specialist for the employing establishment noted that appellant was not in the performance of duty when his accident occurred on June 30, 2014. She advised that he was not authorized to be at his residence at the time of injury. The specialist noted that reference should be made to the July 9, 2014 statement of appellant's immediate supervisor and a July 22, 2014 e-mail the immediate supervisor sent to appellant which indicated that appellant did not have permission to go back and forth to his residence on June 30, 2014. She indicated that appellant was expected to be at his duty station.

By decision dated March 9, 2015, OWCP denied appellant's claim for a work-related injury on June 30, 2014. It noted that it was modifying the basis for the denial because he did not show that his June 30, 2014 fall occurred in the performance of duty. OWCP discussed the statements indicating that appellant was not authorized to travel back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014 and indicated, "The evidence is sufficient to modify the decision dated August 26, 2014 from a denial based on one of the five basic elements for FECA coverage (fact of injury, medical) to a denial based on another basic element (performance of duty). Your case remains denied as you have not met the performance of duty element of your claim."

In a December 8, 2015 letter, appellant, through counsel, requested reconsideration of OWCP's March 9, 2015 decision. Counsel argued that appellant was responding to a direct order from his supervisor to pack up and move his things from his home to the Fort Sam Houston Commissary when he was injured on June 30, 2014. He noted that appellant's supervisor "did not direct [appellant] to pack up his things on a day prior to Monday June 30, 2014, he specifically told [appellant] to pack them up on June 30, 2014, and bring them with him."

In a February 16, 2016 letter to OWCP, an injury compensation specialist for the employing establishment noted that appellant was directed to be at his designated duty station at 7:00 a.m. on June 30, 2014. She repeated some of the statements she made in her November 18, 2014 letter.

In a February 29, 2016 decision, OWCP denied modification of its March 9, 2015 decision denying appellant's claim for a June 30, 2014 work-related injury. It again found that he did not sustain an injury in the performance of duty on that date.

LEGAL PRECEDENT

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[6] The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[7] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[8] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[9]

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[10] When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from, and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.[11] Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,[12] or which are in the nature of necessary personal comfort or ministration.[13]

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[6] 5 U.S.C. § 8102(a).

[7] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[8] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[9] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[10] *Mary Keszler*, 38 ECAB 735, 739-40 (1987).

[11] *Donna K. Schuler*, 38 ECAB 273, 274 (1986).

[12] The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: "(1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer." *Betty R. Rutherford*, 40 ECAB 496, 498-99; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

[13] *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

OWCP's procedures address off-premises injuries sustained by workers who perform service at home:

> "Ordinarily, the protection of [FECA] does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations of this sort, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the employer. The official superior should be requested to submit a statement showing--
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> > (a) What directives were given to or what arrangements had been made with the employee for performing work at home or outside usual working hours;
> >
> > (b) The particular work the employee was performing when injured; and
> >
> > (c) Whether the official superior is of the opinion the employee was performing official duties at the time of the injury, with appropriate explanation for such opinion."[14]

ANALYSIS

On July 3, 2014 appellant filed a CA-1 form alleging that at 1:00 p.m. on Monday, June 30, 2014 he sustained neck, shoulder, and right leg injuries due to a fall on the stairway going from the second to the first floor of his home in San Antonio, TX. He explained that on June 30, 2014 he fell while he was in the process of relocating his telework items from his home to the Fort Sam Houston Commissary at the direction of his supervisor. Appellant indicated that he was carrying a box of reference materials and supplies when he fell.

The Board finds that appellant has not met his burden of proof because he was not in the course of his employment at the time of his claimed injury and therefore was not in the performance of duty.[15]

Appellant's supervisor indicated that appellant had not sustained an injury in the performance of duty on June 30, 2014 because his alleged injury occurred at home at 1:00 p.m. on that date despite the fact that he had directed appellant on three occasions prior to June 30, 2014 to report to the Fort Sam Houston Commissary at 7:00 a.m. on June 30, 2014. He noted that he knew nothing about appellant making trips back and forth from his home to the Fort Sam Houston Commissary to haul office supplies. The supervisor stated that he was never asked

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(f)(1) (August 1992); *see also S.F.*, Docket No. 09-2172 (issued August 23, 2010).

[15] *See supra* note 7.

permission to carry out this task and had not approved it.[16] He noted that appellant's duty station on June 30, 2014 was the Fort Sam Houston Commissary.

Appellant has not shown that his claimed June 30, 2014 injury occurred at a time when he may reasonably be stated to have been engaged in the master's business, at a place where he may have reasonably been expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[17] He has not met these important indicia of being in the performance of duty at the time of his June 30, 2014 fall. Appellant was not at a place where he may have reasonably been expected to be in connection with the employment when he fell on June 30, 2014 because his duty station on that date was the Fort Sam Houston Commissary and his supervisor directed him to report there at 7:00 a.m. on that date.

Appellant's supervisor indicated that he had not authorized appellant to travel back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014. Although he told appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014, this comment could not be reasonably interpreted as approval for appellant to leave his workplace and travel back and forth between his home and his duty station during the workday without prior approval. Appellant was expected to report to his duty station at the Fort Sam Houston Commissary and perform his usual duties at the time of his fall on June 30, 2014. Therefore, he was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto at the time of his June 30, 2014 fall.

OWCP's procedures provide that, ordinarily, the protection of FECA does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations as such, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the employer.[18] In such circumstances, the official superior is to be asked if the employee was performing official duties at the time of the injury.[19] In this case, appellant's supervisor provided a clear opinion that appellant was not performing official duties at the time of the injury.

On appeal counsel argues that appellant's claimed June 30, 2014 injury occurred in the performance of duty because appellant was authorized to travel back and forth between his home and the employing establishment premises in order to bring all his things (including years of files, computer, printer, *etc*.) from his home to his office on that date. However, he has not provided any evidence which establishes that appellant was authorized to engage in such activities as part of his regular or incidental job duties. Appellant argued that his supervisor gave him permission orally to ferry his files from his home to the office workstation, however, there is no documented evidence of same.

[16] Appellant's supervisor indicated that his comment to appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014 was not meant to imply that he had approved trips to and from his residence.

[17] *See supra* note 8.

[18] *See supra* note 14.

[19] *See id.*

For these reasons, appellant has not established an injury in the performance of duty on June 30, 2014.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on June 30, 2014.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board